No. 17-368

In The Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER,

v.

TESLA ENERGY OPERATIONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

RICHARD A. FEINSTEIN
BOIES, SCHILLER & FLEXNER LLP
1401 New York Ave., N.W.
Washington, D.C. 20005

STEVEN C. HOLTZMAN
KATHLEEN R. HARTNETT
SEAN P. RODRIGUEZ
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison St.
Oakland, CA 94612

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
JEFFREY A. JAECKEL
SOPHIA M. BRILL
SETH W. LLOYD
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
DMaynard@mofo.com

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

Counsel for Respondent Tesla Energy Operations, Inc.

FEBRUARY 12, 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In January 2018, SolarCity Corporation was renamed Tesla Energy Operations, Inc. Like SolarCity, Tesla Energy Operations, Inc. is wholly owned by Tesla, Inc., a publicly traded company.

TABLE OF CONTENTS

Page

RULE 29.6 CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 4

A. SolarCity 4

B. SRP 5

C. SRP's Anticompetitive Conduct 7

D. District Court Proceedings 8

E. Ninth Circuit Proceedings 10

SUMMARY OF ARGUMENT 12

ARGUMENT 17

I. AN INTERLOCUTORY DENIAL OF A *PARKER* STATE-ACTION DEFENSE CAN BE EFFECTIVELY REVIEWED ON APPEAL FROM FINAL JUDGMENT 17

A. Because *Parker* Establishes An Exemption From The Antitrust Laws' Substantive Prohibitions, Orders Denying The Defense Are Not Effectively Unreviewable 18

B. The "Important" Interests SRP Invokes Cannot Justify Interlocutory Appeal 24

1. Importance is an additional, not a substitute, requirement 24

TABLE OF CONTENTS—Continued

Page

2. The interests SRP cites are insufficient 29

II. THE *PARKER* STATE-ACTION DEFENSE IS NOT COMPLETELY SEPARATE FROM THE MERITS OF AN ANTITRUST ACTION 39

A. The *Parker* Inquiry Overlaps With The Merits 39

B. SRP Cannot Satisfy The "Completely Separate" Requirement By Creating A Subcategory Of "Legal" *Parker* Claims 45

III. INTERLOCUTORY ORDERS DENYING A *PARKER* STATE-ACTION DEFENSE ARE NOT CONCLUSIVE 53

A. The General Class Of Orders Denying *Parker* Defenses Is Not Conclusive 53

B. The District Court's Order Here Did Not Conclusively Resolve The *Parker* Issue 56

IV. THE COLLATERAL-ORDER DOCTRINE SHOULD NOT BE EXPANDED 59

CONCLUSION 62

TABLE OF AUTHORITIES

Page

CASES

324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) 34

Abney v. United States, 431 U.S. 651 (1977) 19

Alden v. Maine, 527 U.S. 706 (1999) 30

Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492 (1988) 44

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 38, 46, 52

Ball v. James, 451 U.S. 355 (1981) 5, 6, 32

Behrens v. Pelletier, 516 U.S. 299 (1996) 30

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 38

City of Mesa v. Salt River Project Agric. Improvement & Power Dist., 373 P.2d 722 (Ariz. 1962) 5, 32

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 10, 27, 28, 37, 39, 40, 56, 57

Commuter Transp. Sys., Inc. v. Hillsborough Cty., 801 F.2d 1286 (11th Cir. 1986) 25, 56

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 39, 41, 42, 49, 51, 52

Cunningham v. Hamilton Cty., 527 U.S. 198 (1999) 42, 51

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 1, 17, 19, 20, 24, 26, 27, 28, 57

Edelman v. Jordan, 415 U.S. 651 (1974) 30

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 39

TABLE OF AUTHORITIES—Continued

Page

Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684 (S.D.N.Y. 2009) 55

Freedom Holdings, Inc. v. Cuomo, 624 F.3d 38 (2d Cir. 2010) 55

Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2d Cir. 2004) 54

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 45

FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) 21, 37, 43, 44, 53, 54

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 9, 21, 45, 48, 50, 53

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 53, 54

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 30, 37

Hemi Grp., LLC v. City of New York, 559 U.S. 1 (2010) 4

Hertz Corp. v. Friend, 559 U.S. 77 (2010) 51

Jinks v. Richland County, S.C., 538 U.S. 456 (2003) 31

Johnson v. Jones, 515 U.S. 304 (1995) 39, 41, 42, 45, 48, 51

Kay Elec. Co-op v. City of Newkirk, Okla., 647 F.3d 1039 (10th Cir. 2011) 44

Lauro Lines s.r.l. v. Chasser, 490 U.S. 495 (1989) 19, 26, 27

TABLE OF AUTHORITIES—Continued

Page

Local 266, I.B.E.W. v. Salt River Project Agric. Improvement & Power Dist., 275 P.2d 393 (Ariz. 1954) 5, 6, 47

Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391 (5th Cir. 1996) 25, 55

Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017) 1, 17, 61

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 20, 25

Mitchell v. Forsyth, 472 U.S. 511 (1985) 19, 22, 23, 24, 40, 41, 55

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) 1, 2, 17, 28, 29, 33, 51, 57, 58, 59, 60, 61

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 31

North Carolina State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015) 33, 43, 45, 47, 49, 50, 54

Osborn v. Haley, 549 U.S. 225 (2007) 25, 26, 53

Owen v. City of Independence, 445 U.S. 622 (1980) 30, 31, 34

Parker v. Brown, 317 U.S. 341 (1943) 1, 20, 22, 40

Patrick v. Burget, 486 U.S. 94 (1988) 22, 23

Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) 26, 52

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 19, 22, 23, 30, 36, 48

Reynolds v. Sims, 377 U.S. 533 (1964) 31

Richardson v. McKnight, 521 U.S. 399 (1997) 40

TABLE OF AUTHORITIES—Continued

Page

S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 21, 23, 41

Segni v. Commercial Office of Spain, 816 F.2d 344 (7th Cir. 1987) 21

Sell v. United States, 539 U.S. 166 (2003) 18, 40

Shaw v. Delta Airlines, 463 U.S. 85 (1983) 35

South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006) 21, 24

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 50

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995) 18, 23, 31, 32, 36, 38, 57, 58

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 31, 32, 47, 54

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) 44

United States v. MacDonald, 435 U.S. 850 (1978) 56

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 39, 42, 43, 53

Will v. Hallock, 546 U.S. 345 (2006) 17, 18, 24, 28, 32, 36, 37, 38, 49

STATUTES AND RULES

28 U.S.C.

§ 1291 ..... 1, 17, 24, 27, 38, 43, 49, 57, 58

§ 1292 ..... 9, 16, 23, 46, 56, 58, 59, 60

§ 2072 60

TABLE OF AUTHORITIES—Continued

Page

Ariz. Rev. Stat.

§ 30-813 7

§ 40-202(B) 6, 10

§ 40-286 7

§ 48-2302 5

§ 48-2383 6

Fed. R. Civ. P. 12(b)(6) 8, 24

Fed. R. Civ. P. 23(f) 61

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 ..... 8, 9, 33, 34

Rules Enabling Act Amendments, 28 U.S.C. § 2071 *et seq.* 60

Sherman Act, 15 U.S.C. § 1 *et seq.* 2, 20, 56

OTHER AUTHORITIES

Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure (3d ed. 2017)

§ 3911.1 58

§ 3911.2 39

§ 3914.10 34

§ 3929 & n.30 46

Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003) 32

TABLE OF AUTHORITIES—Continued

Page

Minutes of Fall 2014 Mtg. of Advisory Cmte. on Appellate Rules (Oct. 20, 2014) 61

Minutes of Spring 2010 Mtg. of Advisory Cmte. on Appellate Rules (Apr. 8 and 9, 2010) 60

Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law (4th ed. 2014) 21, 33, 34

INTRODUCTION

Congress has vested the courts of appeals with jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. This finality mandate "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Thus, although this Court has held that a "narrow class of decisions that do not terminate the litigation" may "be treated as 'final'" under Section 1291, it has "also repeatedly stressed that the 'narrow' exception should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867-68 (1994) (internal citation omitted). Particularly given the other avenues for pursuing immediate review, this Court has been reluctant to expand this "class of collaterally appealable orders." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009).

Petitioner Salt River Project Agricultural Improvement and Power District (SRP) hopes to transform this narrow exception into a broad authorization for interlocutory appeal. Attempting to analogize to the denials of certain immunities, SRP contends that all public entities should be entitled to an immediate appeal as of right from orders rejecting the state-action defense to federal antitrust liability established in *Parker v. Brown*, 317 U.S. 341 (1943).

Yet SRP elides a critical distinction between those immunity doctrines and the *Parker* defense. Qualified immunity, sovereign immunity, and other similar protections are recognized immunities from *suit*. They are designed to protect particular types of defendants from being subject to particular types of litigation. For that reason, any denial of such an immunity is effectively "final"—if appeal is delayed until final judgment, the right to be free of litigation already will have been lost.

Parker, by contrast, establishes no such immunity from litigation. Rather, it represents this Court's interpretation of the substantive provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.* In *Parker*, this Court held that Congress did not intend the general prohibition on anticompetitive restraints to supersede certain kinds of state regulation; if the defense applies, the challenged conduct does not violate the antitrust laws. Because *Parker* thus shields certain conduct from *liability*—and not certain defendants from litigation itself—no right protected by *Parker* is lost by requiring defendants to await final-judgment appeal.

For this fundamental reason, the court of appeals correctly held that the denial of a *Parker* defense is not "effectively unreviewable" after final judgment, and thus fails that requirement for interlocutory appeal of so-called "collateral orders." Pet. App. 6a-11a; *see Mohawk*, 558 U.S. at 105. If the district court's denial is erroneous, any judgment imposed as a result can be reversed after final judgment. Because *Parker* affords no immunity from trial, the purported harm to state or local interests caused by continued litigation is no

different from that engendered by any number of district court orders denying potentially dispositive motions. Were SRP's contentions taken to their logical conclusion, every suit against a public entity or challenging a state statute would give rise to repeated interlocutory appeals, substantially eroding Section 1291's finality requirement.

Additionally, a *Parker* denial is not completely separate from the merits, another collateral-order prerequisite. Quite the contrary: because *Parker* governs the scope of antitrust liability, it *is* a merits question. And regardless, the complex inquiry required to assess the *Parker* defense overlaps significantly with the other substantive issues presented in an antitrust claim, requiring scrutiny of the same facts. Allowing piecemeal appeals of *Parker* denials would thus produce precisely the sort of inefficiencies that the separateness requirement is intended to avoid.

Finally, a *Parker* denial is unlikely to conclusively resolve whether the *Parker* defense is available—yet another reason it fails the collateral-order requirements. Because *Parker*'s application will depend on an assessment of a variety of relevant facts, a district court's decision on a motion to dismiss or at summary judgment often will not be its final word on the *Parker* issue. Indeed, the district court here expressly stated it would revisit it.

Appellate jurisdiction is defeated if even one of these "stringent" requirements remains unsatisfied.

Orders denying *Parker* defenses fail all three. The decision below should be affirmed.

STATEMENT

Because SRP attempts to appeal the denial of a motion to dismiss, all factual allegations stated in respondent SolarCity's complaint must be taken as true. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 5 (2010).[1]

A. SolarCity

SolarCity is America's largest installer of rooftop solar energy systems. J.A. 12 (¶16). It designs, manufactures, and sells its systems to residential and commercial customers. J.A. 12 (¶16). SolarCity's customers use these systems to generate electricity. J.A. 24 (¶70). When a system generates more electricity than the customer needs, the customer can transfer this excess electricity to a connected electrical grid for others to use. J.A. 25 (¶¶74-76). These rooftop solar energy systems are sometimes referred to as "distributed" solar, as distinguished from centralized, utility-scale solar power plants. J.A. 8 (¶3 n.1). By buying or leasing such systems, customers reduce the demand for electricity sold by electrical utilities. J.A. 19-20 (¶¶50, 52).

---

[1] Although SolarCity changed its name to Tesla Energy Operations, Inc. in January 2018, this brief refers to respondent as "SolarCity" to be consistent with the proceedings below and SRP's opening brief.

B. SRP

SRP is one of the nation's largest electric utilities. J.A. 12 (¶18). It sells electricity and transmission services to nearly a million customers in the Phoenix metropolitan area. J.A. 12 (¶18). It is a monopolist, providing more than 95% of the electricity used by retail customers within its geographic market. J.A. 20 (¶¶53-55).

SRP is also a "nominal public entit[y]" under Arizona law. *Ball v. James*, 451 U.S. 355, 368 (1981) (addressing constitutional challenge to SRP's acreage-based voting scheme); Ariz. Rev. Stat. § 48-2302. Private landowners created SRP in 1902 and later lobbied the Arizona legislature for a statute denominating SRP a political subdivision. *Ball*, 451 U.S. at 357-58. Having achieved this status, SRP could issue tax-exempt bonds for water-management projects. *Id.* at 358-59. The ability to "raise revenue through interest-free bonds" was the "sole legislative reason" for granting SRP this designation. *Id.* at 369.

Although SRP is nominally public, its functions remain "purely business and economic, and not political and governmental." *Local 266, I.B.E.W. v. Salt River Project Agric. Improvement & Power Dist.*, 275 P.2d 393, 402 (Ariz. 1954). Private landowners continue to own and run SRP. *Ibid.* Its retail electric operations are considered "proprietary" activities for nearly all purposes, *City of Mesa v. Salt River Project Agric. Improvement & Power Dist.*, 373 P.2d 722, 729 (Ariz. 1962), and its relationship with its customers is

"essentially that between consumers and a business enterprise," *Ball*, 451 U.S. at 370.

The landowners who control SRP benefit personally from SRP's electricity sales. *Id.* at 369 n.17; J.A. 13-14 (¶¶24, 29). The "profits from the sale of electricity are used to defray the expense in irrigating * * * private lands for personal profit." *Local 266*, 275 P.2d at 393, 402. Thus, SRP "does not function to 'serve the whole people' but rather [SRP] operates for the benefits of these 'inhabitants of the district' who are private owners." *Id.* at 403.

SRP's governance structure reinforces these private interests. Only individuals who own land in SRP's original geographic area can vote in SRP elections. J.A. 14 (¶32). A substantial percentage of SRP's electricity customers have no right to vote in SRP elections at all. J.A. 14 (¶32). And for a majority of the SRP Board seats, the value of each landowner's vote is proportionate to landholdings—so that a vote cast by the holder of ten acres counts ten times as much as a vote cast by the holder of one acre. Ariz. Rev. Stat. § 48-2383.

SRP's retail electric business is also largely unregulated, allowing it to determine the rates its customers pay. J.A. 18 (¶42). Arizona has, however, declared a policy in favor of competition—stating that "a competitive market shall exist in the sale of electric generation service." Ariz. Rev. Stat. § 40-202(B). It has also enacted state-antitrust savings clauses to ensure that utilities, including "public power utilities,"

do not use their market power to restrain competition. Ariz. Rev. Stat. § 30-813; *see* § 40-286 (same with respect to private utilities).

C. SRP's Anticompetitive Conduct

For many years, SRP promoted rooftop solar systems (including SolarCity's) through customer incentives and rebates. J.A. 24-25 (¶¶72-76). But these systems became increasingly cost-competitive with SRP's own services. J.A. 27-28 (¶¶78-86). In response to this growing threat, SRP began to use its monopoly power to eliminate competition from rooftop solar—which it dubbed "the enemy." J.A. 19-20 (¶51), 36-37 (¶119).

Most significantly, SRP adopted a new, punitive price structure designed to make distributed solar cost-prohibitive. J.A. 34-35 (¶¶112-15, 119). This new regime forces any residential customer who installs a rooftop solar system to pay approximately 65% more than before. J.A. 8-9 (¶¶5-6), 32-33 (¶¶107-08). By contrast, SRP increased the average bill for nonsolar residential customers by only 3.9%. J.A. 8-9 (¶5). Commercial solar customers were similarly penalized, with annual increases of about $24,000—increases not imposed on nonsolar customers. J.A. 10, 34 (¶¶10, 111).

SRP's new rate plan succeeded in defeating "the enemy." New applications to install distributed solar systems dropped by over 96%. J.A. 9 (¶7), 39-40 (¶123).

As a result, SolarCity was forced to stop selling its systems in SRP's territory. J.A. 41 (¶125).[2]

D. District Court Proceedings

1. In response to these anticompetitive actions, SolarCity filed suit against SRP, alleging violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. J.A. 49-53 (¶¶143-75). SolarCity also advanced state-law antitrust and tort claims. J.A. 54-59 (¶¶176-217).

SRP moved to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). It argued, among other things, that the state-action doctrine recognized in *Parker* required dismissal of SolarCity's antitrust claims. Pet. App. 67a. It further contended that the Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. §§ 34-36, precluded these claims to the extent SolarCity sought damages.

2. The district court denied in part SRP's motion to dismiss. As the court recognized, to prevail on a *Parker* defense, a defendant generally must show: (1) that "the State has articulated a clear and affirmative policy to allow the anticompetitive conduct" and (2) that "the State provides active supervision of

---

[2] While SRP attempts to appeal the denial of its motion to dismiss, its statement of facts goes beyond the pleadings in addressing its conduct. Br. 7-8. It quotes a declaration submitted at the summary judgment stage, cites an extra-record source for a purported consensus about pricing challenges, and asks this Court to take judicial notice of another document that it unsuccessfully sought to introduce at both the district court and court of appeals. Br. 7-8; *see* Pet. App. 20a n.1, 44a.

anticompetitive conduct." Pet. App. 67a (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992)). The court concluded it could not determine on the pleadings whether SRP met either of those requirements, as both issues were "factual ones which are inappropriately resolved in the context of a motion to dismiss." Pet. App. 67a (alterations omitted). SolarCity had "allege[d] [1] that Arizona has a policy permitting competition in the relevant market and [2] that [SRP] operates without supervision," and that was "all that [was] necessary at this stage." Pet. App. 67a. SRP's brief in this Court conspicuously fails to mention the district court's active-supervision holding. *Cf.* Br. 10.

The district court did, however, accept SRP's argument that the LGAA shielded it from SolarCity's antitrust damages claims. Pet. App. 64a-65a, 68a-69a.

SRP filed a notice of appeal, relying on Section 1291. J.A. 2.

3. After filing its notice of appeal, SRP asked the district court to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). J.A. 3.

The district court declined to do so, concluding that SRP had not demonstrated any substantial ground for disagreement on its proffered *Parker* defense. Pet. App. 25a. Departing in part from the reasoning of its prior order, the district court accepted SRP's contention that whether SRP satisfied *Parker*'s clear-articulation prong was a question of law, not fact. Pet. App. 25a. But it explained that, regardless, "had the Court reached the issue as a matter of law, it would

have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market." Pet. App. 27a. Rather, as the district court emphasized, "[t]he clearly articulated policy in Arizona *favors* competition." Pet. App. 27a (citing Ariz. Rev. Stat. § 40-202(B); emphasis by district court).

Notably, the court did not disturb its conclusion that whether SRP satisfied the active-supervision prong was a question of fact that must await further development. Pet. App. 25a-27a; *see* Pet. App. 26a n.2 (emphasizing that SRP "only takes issue with the Court's finding that whether Arizona has a clearly expressed and articulated policy displacing competition in the retail electricity market was a question of fact"). The court also made clear that it "did not make a final decision on the state-action doctrine" and that SRP was "free to raise" the issue at summary judgment. Pet. App. 33a n.7.

E. Ninth Circuit Proceedings

The court of appeals dismissed SRP's appeal for lack of jurisdiction, rejecting SRP's argument that the denial of a *Parker* defense falls within the small class of "collateral orders" that may be appealed before final judgment. Pet. App. 4a; *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The court of appeals trained its focus on the third of the three "*Cohen*" requirements for an appealable collateral order: whether the issue would "evade effective review if not considered immediately."

Pet. App. 5a. The court viewed the critical question to be "whether the state-action immunity doctrine provides immunity from suit or immunity from liability." Pet. App. 8a. As it explained, while this Court has "allowed immediate appeals from denials of Eleventh Amendment immunity, absolute immunity, and qualified immunity," it has done so because "those immunities are immunities from suit." Pet. App. 7a-8a (internal citations omitted). But "[u]nlike immunity from suit, immunity from liability can be protected by a post-judgment appeal." Pet. App. 8a.

The court of appeals concluded that *Parker* provides immunity from liability, not suit. The court explained that *Parker* is premised on the conclusion that Congress did not intend the Sherman Act to block state laws or regulations. Pet. App. 9a. As the court concluded, "[a] denial of a motion to dismiss based on state-action immunity is thus no different from other denials of dismissal" because a defendant "may move to dismiss for failure to state a claim" whenever he "is sued under a statute that he believes was never meant to apply to him." Pet. App. 9a. Recognizing that interlocutory appellate jurisdiction has never been available for such a broad class of district court orders, the court saw no basis for creating a *Parker* exception. Pet. App. 9a-11a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that a district court's interlocutory denial of a defendant's *Parker* defense is not an appealable "collateral order." Such an order does not meet any of the three requirements for interlocutory appeal: it does not conclusively determine the disputed question; it is not completely separate from the merits; and it is not effectively unreviewable following final judgment.

I. As the Ninth Circuit held, an order rejecting a state-action defense fails the third requirement for interlocutory review because it can be effectively reviewed after final judgment. That is because the *Parker* doctrine establishes an exception from antitrust liability, not an immunity from suit. *Parker* is an interpretation of the Sherman Act's liability provisions based on this Court's conclusion that Congress did not intend to prohibit certain types of state regulation. A State's ability to regulate can be fully vindicated by reversal of any ultimate liability judgment. Nothing in the Sherman Act or this Court's decisions interpreting it suggests that Congress also intended to shield certain defendants from litigation altogether. For that reason, a *Parker* defense, like other liability issues, can be effectively reviewed following final judgment. No protected interest is lost by the delay.

Seeking to avoid this analysis, SRP has changed theories since the Ninth Circuit proceedings, now contending that the only relevant consideration is the "importance" of the interests supposedly threatened by

awaiting final judgment. But this Court has invoked "importance" only to further *narrow* the category of appealable collateral orders. It has held that an order denying an immunity from suit may be appealed only if the immunity in question *also* is sufficiently important. Because *Parker* provides defendants no immunity from suit, there is no need to conduct this importance inquiry.

In any event, the particular interests SRP cites to demonstrate "importance" cannot justify immediate appeal of *Parker* denials. Analogizing to sovereign immunity and qualified immunity, SRP contends that the *Parker* doctrine similarly protects States' dignitary interests and the efficiency and initiative of government officials. Yet these interests have been held to justify immunity from suit, and thus immediate interlocutory appeal, only where sovereign and qualified immunity actually apply—namely, in damages actions against sovereign states or government officials. Only in damages actions against these specific types of defendants does the litigation itself (as opposed to any ultimate judgment) offend the asserted interests. But the class of *Parker* orders posited by SRP would encompass many suits where the litigation itself does not offend those interests: *Parker* can be invoked by an array of public entities as a defense against antitrust actions seeking different types of relief. And even assuming some subset of *Parker* cases implicates the particular interests underlying sovereign and qualified immunity, those interests are adequately protected by the sovereign-immunity

doctrine itself (which shields sovereign states in antitrust cases as elsewhere) and the LGAA (which protects local officials from damages claims).

Ultimately, a district court's order denying a *Parker* defense no more implicates the dignitary and efficiency interests SRP invokes than do many garden-variety orders refusing to dismiss a claim. Indeed, States' dignitary interests (at least as SRP characterizes them) would be equally offended by suits advancing preemption or constitutional claims, but this Court has never suggested that any order permitting such claims to proceed is effectively unreviewable following final judgment. Likewise, any suit that challenges government action might affect the efficiency and initiative of government officials, but this Court has made clear that such impairment cannot transform every order permitting such litigation into a Section 1291 "final decision."

II. Orders denying a *Parker* defense also fail the second collateral-order requirement: they are not completely separate from the merits. To the contrary, because *Parker* is an interpretation of the substantive scope of the Sherman Act, it is itself a merits issue. If *Parker* applies, the conduct does not violate the federal antitrust laws at all. That is unlike the immunities on which SRP relies, which may apply even if the defendant violated the law.

Nor is a *Parker* defense completely separate from the other merits issues that must be determined in deciding an antitrust claim. *Parker* requires a complex,

multifactor inquiry into whether a State authorized the challenged anticompetitive conduct, the nature of the entity involved, the defendant's incentives to restrain the workings of the market for private gain, and the degree to which the State supervises such restraints. The analysis of these facts and circumstances overlaps substantially with the assessment required to determine if the challenged conduct is unjustifiably anticompetitive, an inquiry that likewise requires examining the competitive marketplace and the defendant's place within it.

Recognizing this inevitable overlap, SRP attempts to restrict the class of appealable *Parker* orders to denials premised on purely "legal" determinations. But the order here does not even fall within that subcategory: the district court rejected SRP's *Parker*-based motion to dismiss because of unresolved factual questions regarding both the clear-articulation and active-supervision requirements. Moreover, SRP's proposed distinction between "legal" and "factual" denials would prove unworkable, as it would both (1) lead to interlocutory appeals that fail to resolve the ultimate *Parker* issue and (2) generate appellate jurisdictional disputes about whether a particular *Parker* order fits within the so-called "legal" subcategory. In any event, even "legal" *Parker* denials would not be completely separate from the merits: *Parker* itself remains a merits question, and it will still often overlap with the inquiry into the anticompetitive effects of the challenged conduct.

III. For two independent reasons, the remaining collateral-order requirement—conclusiveness—also is not satisfied here. First, as a class, orders denying *Parker* defenses are not conclusive. Because *Parker*'s application often will depend on a variety of facts and circumstances that develop over the course of litigation, a district court that initially denies a *Parker* defense at, say, the motion-to-dismiss stage, may later find *Parker*'s requirements satisfied at summary judgment or following trial.

Second, the particular district court order at issue here was expressly not conclusive. The district court stated that further factual development was necessary and that it made no "final decision" on the merits of SRP's *Parker* defense. For that reason alone, appellate jurisdiction is lacking under the plain text of Section 1291: as this Court has held, an order cannot be a "final decision" if the district court has characterized its decision as tentative.

IV. Antitrust defendants such as SRP have other means to pursue interlocutory appeals from orders rejecting *Parker* defenses, including Section 1292(b). This Court also is authorized to issue rules designating particular categories of prejudgment orders immediately appealable. This rulemaking process provides a better mechanism to remedy any need for additional avenues for appeal than would the unwarranted extension of the collateral-order doctrine SRP demands here.

ARGUMENT

"From the very foundation of our judicial system, the general rule has been that the whole case and every matter in controversy in it [must be] decided in a single appeal." *Microsoft*, 137 S. Ct. at 1712 (brackets by Court); *see* 28 U.S.C. § 1291. The collateral-order doctrine is a "narrow exception" to this rule of finality. *Digital Equip.*, 511 U.S. at 867. The doctrine provides for appeal only from district court orders that satisfy each of three requirements: they must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (brackets by Court). "The[se] conditions are stringent, and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Id.* at 349-50. Moreover, not only must the particular order a defendant wishes to appeal satisfy these requirements, but the "entire category to which a claim belongs" likewise must do so. *Mohawk*, 558 U.S. at 605. District court orders denying *Parker* defenses fail each of these requirements.

I. AN INTERLOCUTORY DENIAL OF A *PARKER* STATE-ACTION DEFENSE CAN BE EFFECTIVELY REVIEWED ON APPEAL FROM FINAL JUDGMENT

This Court may resolve the question presented on the same straightforward basis as the court of appeals: because the interlocutory denial of a *Parker* defense

may be effectively reviewed following final judgment, it does not satisfy the third of the three collateral-order requirements.

A. Because *Parker* Establishes An Exemption From The Antitrust Laws' Substantive Prohibitions, Orders Denying The Defense Are Not Effectively Unreviewable

1. An order is "effectively unreviewable only where [it] involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-99 (1989). Some categories of orders satisfy this requirement by resolving legal issues that simply cannot be meaningfully addressed following final judgment. For example, the appeal of an order rejecting a defendant's claim to be free of involuntary medical treatment would "come[ ] too late" were it available only after the defendant had undergone forced medication. *Sell v. United States*, 539 U.S. 166, 177 (2003).

This Court has extended this principle to cover a limited category of claims that involve a defendant's right to be immune from litigation altogether. Unlike claims to be exempt from liability—the prototypical issue reviewed following final judgment, *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 43 (1995)—claims of absolute presidential immunity, qualified immunity, Eleventh Amendment immunity, and Double Jeopardy all involve a "right to avoid trial." *Will*, 546 U.S. at 350. Each of these claims could,

in theory, be reviewed following trial and judgment; an appellate court can, for example, reverse a conviction that violates Double Jeopardy. *Abney v. United States*, 431 U.S. 651, 660 (1977). But such post-judgment review is inadequate because by that point defendants will already have been irrevocably deprived of the right to avoid trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity "is an *immunity from suit* rather than a mere defense to liability; like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial" (emphasis by Court)); *accord, e.g.*, *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 & n.5 (1993) (sovereign immunity); *Abney*, 431 U.S. at 662 (Double Jeopardy). For these types of claims, the "heart of the issue" is whether there "is in fact an entitlement not to stand trial." *Mitchell*, 472 U.S. at 525.

As this Court has also recognized, however, creative litigants seeking interlocutory appeals may attempt to characterize any denial of a motion to dismiss or for summary judgment as implicating a right to avoid trial. "[V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equip.*, 511 U.S. at 873. Thus, courts must "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id.* at 874. Only an "'explicit statutory or constitutional guarantee that trial will not occur'"—or, as is true of qualified immunity, an immunity from litigation itself that is well-grounded in "public law"—has sufficed. *Id.* at 874, 875 (quoting

Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989)). The Court has emphasized that such an immunity from suit is "a rare form of protection." *Digital Equip.*, 511 U.S. at 879.

2. The *Parker* doctrine confers no such immunity from suit. Instead, *Parker* merely holds that certain state activities fall outside the substantive scope of the antitrust laws.

This Court's decision in *Parker* makes that distinction clear. There, the Court confronted an antitrust suit against officials administering California's raisin-marketing program. *Parker*, 317 U.S. at 344. The Court assumed that the program would violate the Sherman Act were it run by private parties, and also that Congress had the power to prohibit a State from implementing such a program. *Id.* at 350. But the Court concluded that Congress had not done so, finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. *Parker* did not hold or even suggest that Congress, by its silence, intended to provide state entities with immunity from *trial* on antitrust claims. Rather, it concluded that given the Sherman Act's "words and history, it must be taken to be a prohibition of individual and not state *action*." *Id.* at 352 (emphasis added). In other words, *Parker* held that certain state "action[s]" are outside the Sherman Act's prohibitory scope, not that any particular class of defendants is exempt from Sherman Act litigation.

Subsequent decisions confirm that *Parker* rested on an interpretation of the scope of the federal antitrust statutes' liability provisions. Never has this Court indicated that this "disfavored" exception to the more general antitrust mandate of "free enterprise and economic competition" is intended to relieve defendants from litigation. *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). To the contrary, it has reiterated that *Parker* holds only that the Sherman Act "should not be read to bar States from imposing market restraints as an act of government." *Ibid.*; *see also, e.g.*, *Ticor Title*, 504 U.S. at 632 (*Parker* "announced the doctrine that federal antitrust laws are subject to supersession by state regulatory programs"); *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 n.18 (1985) ("the state action doctrine is an implied exemption to the antitrust laws").[3]

---

[3] Although this Court occasionally has referred to *Parker* as establishing an antitrust "immunity," it has never characterized it as an immunity from suit. *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445 (4th Cir. 2006); *see Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) ("Words like 'immunity,' sometimes conjoined with 'absolute,' are often used interchangeably with 'privilege,' without meaning to resolve issues of appealablility." (internal citation omitted)). Similarly, a treatise has observed (as SRP notes, Br. 38) that antitrust suits against public officials may be costly and should be resolved on the pleadings or at summary judgment when possible, IA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶222b (4th ed. 2014), but the treatise expressly declines to take a position on the question presented here, *id.* ¶228e.

To be sure, the *Parker* doctrine is grounded in "principles of federalism and state sovereignty." *Patrick v. Burget*, 486 U.S. 94, 99 (1988). But many doctrines are influenced by federalism principles; that does not make them immunities from litigation or render any order involving those doctrines immediately appealable. In *Parker*, this Court invoked federalism principles for different reasons to achieve different ends than in the qualified- and sovereign-immunity contexts relied on by SRP. The qualified- and sovereign-immunity doctrines are recognized immunities from litigation because (in certain specific circumstances) subjecting government officials or sovereign states to a *trial* is unjustifiably "disruptive of effective government," *Mitchell*, 472 U.S. at 526, and offensive to "States' dignitary interests," *Puerto Rico Aqueduct*, 506 U.S. at 146.

By contrast, *Parker* considered federalism principles only in construing the Sherman Act's *liability* provisions. The Court invoked as a canon of statutory construction the principle that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351. Thus, the "federalism and state sovereignty" principles that animate *Parker* reflect the entirely different concern of precluding federal interference with States' actions in the marketplace. *Patrick*, 486 U.S. at 99.

Parker's distinct focus is manifest in its application to suits against private parties. Qualified immunity and sovereign immunity extend only to certain

classes of government defendants, because protecting those defendants from trial is the purpose of those doctrines. *Mitchell*, 472 U.S. at 526; *Puerto Rico Aqueduct*, 506 U.S. at 146. But *Parker* is concerned with shielding state-regulated *activities* from federal antitrust interference—not with protecting particular defendants from litigation. Its "federalism rationale" thus "demand[s] that the state-action exemption also apply in certain suits against private parties." *Patrick*, 486 U.S. at 99-100. After all, private parties' anti-competitive actions may be "the product of state regulations." *Id.* at 100. As this Court has therefore made clear, "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *S. Motor Carriers Rate Conference*, 471 U.S. at 58-59.

Parker's essential aim is to exempt certain activities from antitrust liability, and "[a]n erroneous ruling on liability may be reviewed effectively on appeal from final judgment." *Swint*, 514 U.S. at 43. It is only the antitrust defendant that is directly affected by continued litigation itself. Absent a preliminary injunction (which would itself be immediately appealable, 28 U.S.C. § 1292(a)(1)), the state law or regulation remains in place during the litigation. If the court of appeals ultimately concludes that the activities challenged are, in fact, properly deemed the State's own, it can reverse a finding of liability. Although it is "undoubtedly less convenient for a party * * * to have to wait until after trial to press its legal arguments, no protection afforded by *Parker* will be lost in the delay."

South Carolina State Bd. of Dentistry v. FTC, 455 F.3d 436, 445 (4th Cir. 2006).

To the extent SRP's attempted appeal implicates any "entitlement" that might be "effectively lost" absent interlocutory appeal, *Mitchell*, 472 U.S. at 526, it is the same "entitlement" that could be invoked by any defendant whose motion to dismiss for failure to state a claim is rejected: the supposed right conferred by Federal Rule of Civil Procedure 12(b)(6) not to be subject to litigation on a meritless claim. *See* Pet. App. 9a. As this Court has repeatedly recognized, however, to deem such an order "effectively unreviewable" following final judgment—and allow an interlocutory appeal on that basis—would subvert the principles of finality embodied in Section 1291. *E.g.*, *Will*, 546 U.S. at 351; *Digital Equip.*, 511 U.S. at 873.

B. The "Important" Interests SRP Invokes Cannot Justify Interlocutory Appeal

1. Importance is an additional, not a substitute, requirement

Effectively abandoning its position before the Ninth Circuit, SRP now insists this Court has rejected prior precedent deeming the presence of a "right to avoid trial" to be "decisive." Br. 27. Instead, SRP claims, the Court now applies a "functional" test that focuses solely on the "importance of the interests at stake." Br. 30, 41. That is not so.

a. SRP criticizes the Ninth Circuit for focusing on the distinction between an "immunity from liability" and an "immunity from suit" (Br. 27, 41), but SRP ignores its own role in inducing that focus. SRP contended below that "[t]he key question * * * is whether state-action immunity is actually akin to a defense to a cause of action rather than an entitlement to avoid suit altogether." C.A. Br. 42. Additionally, by abandoning the argument it made to the court of appeals, SRP has abandoned the rationale adopted by the only two Circuits that have held interim orders denying a *Parker* defense to be "effectively unreviewable." *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) ("[w]e conclude that *Parker v. Brown* state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—an entitlement not to stand trial"); *Commuter Transp. Sys., Inc. v. Hillsborough Cty.*, 801 F.2d 1286, 1289 (11th Cir. 1986) (same). The novelty of SRP's argument is telling.

b. More importantly, SRP misreads this Court's decisions. This Court has not overruled its precedent recognizing the "crucial distinction" between a "right not to be tried" and an immunity from conviction or liability. *Midland Asphalt Corp.*, 489 U.S. at 801. In fact, two of its most recent collateral-order decisions emphasize that very distinction. In *Osborn v. Haley*, 549 U.S. 225 (2007), this Court held that the denial of Westfall Act substitution was immediately appealable because the statute was "designed to immunize covered federal employees not simply from liability,

but from suit." *Id.* at 238. And in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), this Court reiterated that qualified-immunity appeals satisfy the collateral-order doctrine's requirements "because such orders conclusively determine whether the defendant is entitled to immunity from suit," a question that "could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Id.* at 2019.

This Court has emphasized that the claimed immunity from suit must *also* be sufficiently "important" to justify collateral-order appeal. *E.g.*, *Digital Equip.*, 511 U.S. at 878. But contrary to SRP's suggestion (Br. 30), this Court has not broadened the category of "effectively unreviewable" orders to encompass any order involving an "important interest." To the contrary, this Court has invoked "importance" only to further *narrow* the category of appealable orders: an order rejecting an immunity from suit can justify immediate appeal only if it *also* meets a certain threshold "level of importance." *Digital Equip.*, 511 U.S. at 878; *see* Pet. App. 11a n.3 (correctly noting the existence of this additional requirement). Importance is necessary, but not sufficient, to justify a collateral-order appeal. *Digital Equip.*, 511 U.S. at 871.

Justice Scalia's concurrence in *Lauro Lines*—which SRP characterizes as the supposed "turning point" in this Court's jurisprudence (Br. 29)—makes this clear. In *Lauro Lines*, the defendant argued that the district court's refusal to apply a contractual

forum-selection clause denied the defendant's "right not to be sued at all except in" the specified forum. 490 U.S. at 501. The Court held that any such right could be "adequately vindicated" after trial. *Ibid.* Explaining the majority's conclusion, Justice Scalia observed that the Court had long considered the "importance of the right asserted" to be "a significant part of [its] collateral order doctrine." *Id.* at 502 (Scalia, J., concurring) (citing, *inter alia*, *Cohen*, 337 U.S. at 546). Thus, Justice Scalia reasoned, although the *Lauro Lines* defendant's particular right not to be sued would be "positively destroyed[ ] by permitting the trial to occur and reversing its outcome," such post-judgment reversal "is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals." *Id.* at 502-03. In other words, even when a defendant is deprived of a right not to be tried, that particular right must also be "important" enough to demand departure from the ordinary rules of finality. *Ibid.*

A unanimous Court later applied this same reasoning in *Digital Equipment*. There, the defendant claimed that the appealed order contravened its explicit contractual "right not to stand trial." *Digital Equip.*, 511 U.S. at 871. Even so, this Court declared that "such a right by agreement does not rise to the level of importance needed for recognition under § 1291." *Id.* at 878. As the Court explained, "whether a right is 'adequately vindicable' or 'effectively reviewable[ ]' simply cannot be answered without a judgment about the value of the interests that would

be lost through rigorous application of a final judgment requirement." *Id.* at 878-79. And although statutory or constitutional rights not to stand trial would generally qualify as "'important' in *Cohen*'s sense," the defendant's privately conferred immunity from trial did not. *Ibid.*

Subsequent decisions have continued to apply "importance" as an additional requirement for an order to be effectively unreviewable, not as the sole relevant consideration. *Will v. Hallock* explained that only "some orders denying an asserted right to avoid the burdens of trial" merit appeal, and that the "further characteristic" separating those that do from those that do not is the "value of the interests" impaired. 546 U.S. at 351. As *Will* summarized: "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353.

Similarly, in *Mohawk*—which involved a ruling requiring disclosure of privileged material rather than an asserted immunity from trial—this Court reiterated that any interest destroyed by delayed review also must be "sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." 558 U.S. at 107. SRP cites *Mohawk* for the proposition that importance is "the decisive consideration," quoting *Mohawk's* statement that "the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial

public interest or some particular value of a high order." Br. 3, 30 (quoting *Mohawk*, 558 U.S. at 107). But *Mohawk* did not thereby hold importance to be the *only* consideration. Instead, it held that importance is "the decisive consideration" once it is determined that there is a right (such as the right not to disclose privileged materials) that would be lost by "rigorous application of a final judgment requirement." 558 U.S. at 107. Here, because *Parker* does not provide defendants with an immunity from suit (*supra* pp. 20-24), there is no such right and thus no need to conduct the additional inquiry into the "importance" of the interests *Parker* secures.

2. The interests SRP cites are insufficient

The interests SRP advances would not satisfy a freestanding "importance" test even if there were one. These interests—the "states' dignitary interests as sovereigns" and the "efficiency and initiative of state and local officials" (Br. 32)—may be "important in the abstract," but the "crucial question" is "whether deferring review until final judgment so imperils the interest[s] as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk*, 558 U.S. at 108. Although SRP attempts (Br. 32) to analogize to this Court's qualified- and sovereign-immunity decisions to establish the "importance" of the interests implicated by a *Parker* defense, the analogy fails.

a. As a class, denials of *Parker* defenses do not generally "imperil" the particular dignitary and efficiency interests that SRP invokes. *Mohawk*, 558 U.S.

at 108. Sovereign immunity protects a State's dignitary interests. But it does so only by precluding certain types of suits against certain types of entities: damages suits against the State. *Alden v. Maine*, 527 U.S. 706, 713 (1999); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Likewise, qualified immunity promotes government efficiency and initiative. But it does so only by barring certain damages suits against government officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Accordingly, these doctrines permit injunctive suits against public entities and actors, and even damages suits against certain public-entity defendants. *E.g.*, *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996) (where a "complaint seeks injunctive relief" against government officials, no qualified immunity is available); *Edelman*, 415 U.S. at 664 (the Eleventh Amendment permits "prospective" relief even if effectively against the State itself); *Owen v. City of Independence*, 445 U.S. 622, 623 (1980) ("there is no tradition of immunity for municipal corporations").

The limited nature of these immunities reflects the understanding that not all suits against public-entity defendants sufficiently implicate the relevant "dignitary" and "efficiency" interests to justify qualified- or sovereign-immunity protection. For example, the Eleventh Amendment protects the dignitary interests enjoyed by States because they "maintain certain attributes of sovereignty." *Puerto Rico Aqueduct*, 506 U.S. at 689. But because municipalities and similar state subdivisions do not share this sovereignty, it is "not an encroachment on 'state sovereignty'" (or an

affront to state dignity) to subject these public entities to suit. *Jinks v. Richland County, S.C.*, 538 U.S. 456, 466 (2003); *see Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("[S]ubdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities."). Similarly, the "efficiency and initiative" justification that supports qualified immunity for government officials does not apply to government entities themselves. As this Court has explained, while "the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process," "[t]he inhibiting effect is significantly reduced, if not eliminated, * * * when the threat of personal liability is removed." *Owen*, 445 U.S. at 655-56 (emphasis in original).

Where these particular "dignitary" and "efficiency" interests do not warrant immunity from litigation itself, the justifications for immediate appeal are likewise absent. Thus, this Court has held that district court orders rejecting a municipality's exemption from damages liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), can be effectively reviewed following final judgment. *Swint*, 514 U.S. at 43.

Parker, much like *Monell*, applies to defendants and remedies to which neither qualified nor sovereign immunity extend. That is true even if one disregards the private entities that may invoke the *Parker* defense. For example, *Parker* may exempt conduct by state subdivisions that this Court has determined are not entitled to sovereign or qualified immunity. *Town*

of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985). *Parker* also may preclude injunctive actions that this Court has held do not offend either States' dignity or officials' initiative. *Id.* at 36, 47.

Indeed, the present case illustrates the breadth of the category of "public entities" that might invoke SRP's proposed rule. Although SRP is technically a "public entity," its public status is purely "nominal," *Ball*, 451 U.S. at 368, and it operates like a private business for its own private purposes, *City of Mesa*, 373 P.2d at 729; *supra* pp. 5-6. Like SRP, any number of other "public" entities without the protections of either sovereign or qualified immunity may invoke the *Parker* defense, including "hospital authorities, transportation authorities, electric cooperatives, * * * government-affiliated charitable or nonprofit corporations," and "state bar[s]." Federal Trade Commission, *Report of the State Action Task Force* 17-18 (Sept. 2003) (internal citations omitted). Were SRP successful here, all such entities would soon be asserting their right to immediately appeal the denial of their asserted *Parker* defenses.

Yet permitting litigation to proceed against the variety of public entities that may invoke *Parker* will not generally imperil the same "substantial public interest[s]" presented in damages suits against the State itself or government officials. *Will*, 546 U.S. at 353. Viewed as a class, *Parker* denials thus do not implicate the interests that render qualified- and sovereign-immunity claims effectively unreviewable following final judgment. *Swint*, 514 U.S. at 43.

Rather, as SRP itself acknowledges, *Parker* protects "'the States' power to *regulate*.'" Br. 33 (quoting *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1109 (2015)) (emphasis added). Because this "class of claims" is "adequately vindicated" by appeal following final judgment, it should not be appealable until then. *Mohawk*, 558 U.S. at 107; *Swint*, 514 U.S. at 43.

b. To the extent the interests SRP invokes are implicated in a subset of *Parker* denials, they are protected by other doctrines. If, for example, an antitrust plaintiff advances a claim against a sovereign State in a manner offending the dignitary interests protected by the Eleventh Amendment, the State can invoke sovereign immunity. Similarly, if an antitrust plaintiff seeks damages from local officials, those officials can invoke the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (LGAA). In fact, this statute provides broader protection for local governments than does the qualified-immunity doctrine, as the LGAA (1) shields both local officials and the governments for which they work, (2) applies regardless of whether the defendants have violated clearly established law, and (3) precludes not just damages awards but even most awards of attorneys' fees. *Id.* §§ 35-36; *see* Areeda & Hovenkamp ¶223d.

This case provides a fitting demonstration of the extent to which the "important" interests SRP invokes are already protected without any right to an interlocutory *Parker* appeal. Although the district court denied SRP's *Parker* motion, it granted SRP's

motion based on the LGAA to dismiss SolarCity's antitrust damages claims. Pet. App. 64a-65a. That relief—dismissal of damages claims—is the very protection this Court has deemed adequate to protect States' "dignitary interests" and preserve officials' "efficiency and initiative" in the sovereign-immunity and qualified-immunity contexts. And indeed, SRP could not have obtained such protection under either qualified or sovereign immunity, as it is neither a government official nor a sovereign. *Owen*, 445 U.S. at 632.

c. SRP's open-ended invocation of the "importance" of dignitary and efficiency interests cannot reasonably be cabined to orders denying public entities' *Parker* claims. If those interests were sufficiently important to warrant appeal here, they would justify appeal of a great number of other similar interlocutory orders. Indeed, "there is little to distinguish this defense from many other defenses to antitrust or other claims." 15A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.10 (3d ed. 2017).

The ultimate question in *Parker* cases is whether the federal antitrust laws preempt a State's supposed authorization of a challenged practice, an issue that turns on whether the State authorized the specific conduct at issue and exercised sufficient control over it. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.8 (1987) ("Our decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anti-competitive behavior."); Areeda & Hovenkamp ¶221a (characterizing *Parker* as part of a two-stage

preemption analysis). To the extent that an interlocutory denial of a *Parker* defense offends a State's dignitary interests at all, it does so only because it (provisionally) holds the asserted state law or policy preempted. Although SRP attempts to confine its proposed class of immediately appealable orders to those affecting public-entity defendants, this same supposed dignitary offense would occur when a private party's *Parker* defense is rejected. A State can "structure its economic policymaking" by implementing policies through private entities just as it does through "political subdivisions." *Cf.* Br. 34.

More significantly, SRP's rationale also would apply in a variety of cases involving the interaction of state and federal law. Nearly *any* district court order rejecting a defendant's argument that a state law survives federal preemption would offend the same "federalism and sovereignty interests" posited by SRP. Such orders would deny States "their fundamental sovereign prerogative to regulate their economies within their borders" (or other similarly "fundamental" regulatory interests). *Cf.* Br. 34. As with a *Parker* defense, the defendant's essential argument in such preemption cases is that Congress did not intend to preempt the particular state law or regulation. *E.g.*, *Shaw v. Delta Airlines*, 463 U.S. 85, 95-108 (1983) (addressing defendant's arguments that New York state law survived preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*). In addition, district court orders allowing continued litigation of a constitutional

challenge to a state law would likewise threaten States' "sovereign prerogative" to regulate. Br. 34. The narrow, litigation-related "dignitary interests" this Court has recognized as justifying the immediate appeal of denials of sovereign immunity should not be extended to encompass such a wide-ranging and amorphous additional class of orders. *Puerto Rico Aqueduct*, 506 U.S. at 146-47.

Similarly, the efficiency interests SRP claims here are present in all suits involving public entities or officials. Whenever government officials "make a decision that displeases even a small segment of the public"—say, the inmates in a local jail, or the customers of a government-run utility—they may run the risk of being subject to the burdens of litigation. Br. 37. That is true whether the disgruntled parties are advancing an antitrust, constitutional, contract, or any other type of claim. Yet this Court has never held that such burdens justify interlocutory appeal whenever a district court denies a public entity or official's dismissal motion.

To the contrary, this Court has emphatically rejected that proposition. As already noted, this Court held in *Swint* that district court orders refusing to dismiss damages claims against cities and counties—the public entities to which SRP seeks to analogize—"may be reviewed effectively on appeal from final judgment." 514 U.S. at 43. Likewise, in *Will*, this Court rejected the contention that the refusal to apply the Federal Tort Claims Act's judgment bar is immediately appealable. 546 U.S. at 353. It so held even though as

a result litigation will proceed against government officials and "the efficiency of Government will be compromised and the officials burdened and distracted." *Ibid.* As the Court explained, "if simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral-order appeal would be a matter of right whenever the Government lost a motion to dismiss." *Ibid.*

Qualified immunity, by contrast, does not merely protect officials from litigation burdens; rather, it is designed to *promote* certain conduct. *Ibid.* As *Will* explained, "[t]he nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant law is not 'clearly established.'" *Id.* at 353. The doctrine encourages such initiative by providing public officials with a buffer in which to act freely (often in response to rapidly changing circumstances). *Harlow*, 457 U.S. at 818. Even where their actions are ultimately found to be illegal, they are protected from litigation so long as they could not "fairly be said to 'know' that the law forbade" their conduct. *Ibid. Parker*, on the other hand, does not depend on any presumption regarding what a "reasonably competent public official" should have known, *ibid.*, and thus it provides no similar buffer to promote "reasonable initiative," *Will*, 546 U.S. at 353. To the contrary, *Parker* erects a "disfavored" exception to antitrust liability, with doubts construed against the defense's application. *Phoebe Putney*, 568 U.S. at 236. While the grant of such a defense may "save trouble for the Government and its employees," that alone is not

enough to render its denial immediately appealable. *Will*, 546 U.S. at 353.

SRP attempts to resurrect this rejected "burden" argument by contending there is something special about antitrust litigation that warrants setting aside decisions like *Swint* and *Will*. *E.g.*, Br. 37, 41-42. True, antitrust litigation may be costly. Br. 37 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). But as this Court has recognized, the same may be said of constitutional and many other types of claims. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."). If this Court were to hold the costs of antitrust litigation are sufficiently great to demand the availability of immediate appeal, it would find itself in the business of delineating exactly which substantive claims satisfy SRP's newly devised "unusually onerous" standard. Br. 37. Soon enough, "28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Will*, 546 U.S. at 354. This Court should reject SRP's efforts to bring about this result—as it has consistently rejected similar efforts in the past.

II. THE *PARKER* STATE-ACTION DEFENSE IS NOT COMPLETELY SEPARATE FROM THE MERITS OF AN ANTITRUST ACTION

Interlocutory orders denying a *Parker* defense also fail the second of the three collateral-order requirements: they do not resolve issues "completely separate from the merits of the action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This requirement reflects the need to minimize the costs of the piecemeal appeals against which Section 1291 is directed. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The final-judgment rule itself embodies the presumption that merits questions are most efficiently reviewed after final judgment on a fully developed record. 15A Wright & Miller § 3911.2; *Cohen*, 337 U.S. at 546. The costs of interlocutory appeal are also particularly high where courts will repeatedly consider the same or similar facts and legal issues because the order appealed "involve[s] considerations enmeshed in the merits of the dispute." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988). Accordingly, an issue is separate from the merits only if it is "significantly different from the fact-related legal issues that likely underlie the plaintiff's claim." *Johnson v. Jones*, 515 U.S. 304, 314 (1995). Denials of *Parker* defenses do not satisfy that requirement.

A. The *Parker* Inquiry Overlaps With The Merits

1. A *Parker* defense is not "completely separate from the merits of the action" for a simple reason: the applicability of *Parker* is itself a merits question.

As recounted above (*supra* pp. 20-24), the *Parker* doctrine is an interpretation of the scope of the Sherman Act. *Parker*, 317 U.S. at 344. In stark contrast to the issues this Court has held are separate from the merits of a claim—such as the imposition of a bond, *Cohen*, 337 U.S. at 546; the subjection to forced medication, *Sell*, 539 U.S. at 176; or the denial of an immunity to stand trial, *Mitchell*, 472 U.S. at 527-28—the *Parker* state-action inquiry goes to the very lawfulness of the defendant's underlying conduct. It is thus in no sense "collateral" to the merits. *Cohen*, 337 U.S. at 546.

This Court's treatment of qualified immunity appeals illustrates this critical distinction between merits and non-merits issues. *Mitchell* found "separateness" satisfied for qualified-immunity orders because whether a defendant has "an entitlement not to be forced to litigate the consequences of official conduct" is "distinct from the merits of the plaintiff's claim that his rights have been violated." 472 U.S. at 527-28. This Court continued: "The reason is that the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the 'merits' of the plaintiff's claim that defendant's actions were in fact *unlawful*." *Id.* at 529 n.10 (emphasis added); *see Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (A "legal defense may well involve 'the essence of the wrong,' while [qualified] immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly.").

SRP contends that addressing a *Parker* defense does not require deciding "whether the antitrust laws were violated." Br. 23. But that is not true. *See supra* pp. 20-24. If *Parker* applies, the Sherman Act does not prohibit the challenged conduct, no antitrust law is violated, and for that reason the defendant's actions are not "unlawful." *Parker*, 317 U.S. at 344; *see S. Motor Carriers Rate Conference*, 471 U.S. at 56 n.18. Resolving the *Parker* issue through an interlocutory appeal thus entails precisely the "determination of the 'merits' of the plaintiff's claim" that this Court has held inconsistent with the final-judgment rule embodied in Section 1291. *Mitchell*, 472 U.S. at 529 n.10. In other words, because *Parker* is one of the "fact-related legal issues that * * * underlie the plaintiff's claim," it fails the separability requirement. *Johnson*, 515 U.S. at 314.

2. Even if, as SRP suggests (Br. 19), the "merits" of an antitrust claim should be redefined as only whether a defendant's alleged conduct is unjustifiably anticompetitive, the *Parker* issue still would not be "completely separate" from the merits.

a. This is true even if a court might address a *Parker* defense without also deciding that a defendant's alleged conduct "was in fact anticompetitive." *Cf.* Br. 19-20. This Court has made clear that an ability to resolve a defendant's contention without deciding the ultimate merits (or, here, a subset of the merits) is not enough to render that contention "completely separate." *Coopers & Lybrand*, 437 U.S. at 468. A court can likewise review a *forum non conveniens* argument,

or a class certification motion, or a sanctions request, without resolving whether the plaintiff's underlying claims have merit. Yet this Court still has held that decisions on those issues fail the separability requirement because each may require courts to scrutinize facts, circumstances, or legal issues underlying the parties' dispute on the merits. *Van Cauwneberghe*, 486 U.S. at 528-29 (*forum non conveniens*); *Coopers & Lybrand*, 437 U.S. at 469 (class certification); *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 205-06 (1999) (Rule 37 sanctions).

Even in the qualified-immunity context, this Court has held that some summary judgment denials do not satisfy the requirement of complete separateness. *Johnson*, 515 U.S. at 316. This Court has explained that denials turning on factual issues cannot be immediately appealed because "the close connection between this kind of issue and the factual matter that will likely surface at trial means" that a reviewing court would have to "canvass the record" in a manner that could be duplicated following trial. *Ibid.* Such overlap precludes interlocutory appeal. *Id.* at 314, 316-17.

In short, the critical factor in determining whether an issue is "completely separate" from the merits is whether it "may require" analysis of facts and considerations relevant to the merits, not whether it might be resolved without also resolving the merits. *Cunningham*, 527 U.S. at 205.

b. *Parker* involves just the sort of "significant inquiry into the facts and legal issues presented by" an antitrust plaintiff's claim that makes it "unsuited for immediate appeal as of right under § 1291." *Van Cauwneberghe*, 486 U.S. at 529.

Parker requires a complex, multi-factor inquiry into the defendant's challenged conduct to determine whether it should be deemed "the State's own." *Phoebe Putney*, 568 U.S. at 225. First, if the State itself is not conducting the activity in question, the defendant must show that "the State has articulated a clear policy to allow the anticompetitive conduct." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112. Next, if the defendant is a public entity, an examination of whether it is "controlled by active market participants" is necessary. *Id.* at 1114. Finally, if there is a "risk that active market participants will pursue private interests" through such control, the defendant also must demonstrate it is subject to the "active supervision" of the State. *Id.* at 1114, 1116.

Every step of this multi-part inquiry requires consideration of the same facts and circumstances that will have to be considered (or reconsidered) in determining whether the conduct challenged is anticompetitive. For example, the clear-articulation requirement requires a defendant to demonstrate that the particular anticompetitive conduct challenged "was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229. That, in turn, requires examination of the conduct and its

surrounding circumstances to determine whether and to what extent such anticompetitive consequences were "'foreseeable.'" *Id.* at 231; *see Kay Elec. Co-op v. City of Newkirk, Okla.*, 647 F.3d 1039, 1043 (10th Cir. 2011) (Gorsuch, J.) ("simple permission to play in a market doesn't foreseeably entail permission to rough-house in that market unlawfully").

Following this approach, this Court in *Phoebe Putney* concluded that the State had not authorized the defendant's acquisition of another hospital through its grant of general corporate powers. 568 U.S. at 232. The Court reviewed details about the geographic scope of the hospital-services market and whether "merger of competitors would lead to a significant increase in market concentration." *Ibid.* These are the same sorts of facts and issues that would also be considered in later determining whether a merger would be unjustifiably anticompetitive. *E.g.*, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 533-34 (1973).

The same overlap would occur in determining whether the active-supervision requirement applies. Assessing whether a defendant is controlled by market participants and thus has an incentive to restrain competition would involve considerations relevant to later determining whether a defendant's challenged restraint should be subject to per se condemnation, a "quick look" analysis of its purported costs and benefits, or full rule-of-reason treatment to determine its likely competitive effects. *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500-01 (1988);

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986).

Likewise, determining whether the State has "actively supervised" the challenged conduct would implicate merits questions. The inquiry requires an examination not just of whether an existing regulatory regime suggests the potential for supervision, but also of whether "state officials have undertaken the necessary steps to determine the specifics of the" challenged conduct and "in fact" exercised the necessary supervision. *Ticor Title*, 504 U.S. at 638. That inquiry, as this Court has recently reiterated, is fact-intensive and "depend[s] on *all* the circumstances of a case." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1117 (emphasis added). In particular, it depends on the nature of the antitrust violation itself: the greater the anticompetitive threat, the greater the degree of state supervision that may be required. *Ticor Title*, 504 U.S. at 639 (emphasizing that supervision requirement was not met given "the gravity of the antitrust offense," price-fixing). This sort of detailed examination of the record is—as SRP does not contest (Br. 24)—inconsistent with the requirement that the issue be completely separate from the merits. *Johnson*, 515 U.S. at 316-17.

B. SRP Cannot Satisfy The "Completely Separate" Requirement By Creating A Subcategory Of "Legal" *Parker* Claims

SRP tries to avoid this overlap by rewriting the question presented. Although its petition asked

categorically whether all "orders denying state-action immunity to public entities are immediately appealable" (Br. i), SRP now asks this Court to resolve only "whether collateral-order appeal is * * * available from an order rejecting, *on legal grounds*, a public entity's claim of state-action immunity." Br. 2 (emphasis added); *see* Br. 14 ("Orders Denying State-Action Immunity To Public Entities On Legal Grounds Qualify For Immediate Appeal Under The Collateral Order Doctrine") (principal Argument heading). By "legal grounds," SRP appears to mean decisions turning only on the interpretation of statutes and similar legal authorities. Br. 20-23; *see Ashcroft*, 556 U.S. at 674. SRP's attempt to narrow the class of orders at issue fails for at least three independent reasons.

First, the rule SRP seeks would not save its own appeal. SRP does not attempt to appeal from "an order rejecting, on legal grounds, a public entity's claim of state-action immunity." Br. 2. Rather, as described above, the district court concluded that "factual" questions remained as to *both* the clear-articulation requirement and the active-supervision requirement, Pet. App. 67a—the latter holding being notably omitted from SRP's statement of the case (Br. 10). Although the district court's order denying Section 1292(b) certification later recharacterized the clear-articulation issue as a legal question, this certification order itself is not the subject of this appeal (nor could it have been). 15A Wright & Miller § 3929 & n.30. Regardless, in this subsequent order, the court did not revoke its earlier conclusion that the active-supervision issue presented

factual questions; instead, it noted that SRP's certification motion addressed only the clear-articulation prong. Pet. App. 25a-27a & n.2.

Rather than confront this issue, SRP simply asserts in conclusory fashion that, as an "electorally accountable public entity," it is "not subject to the 'active state supervision requirement.'" Br. 2 n.1. But the district court disagreed. Pet. App. 67a. And rightly so: a *municipality* is generally "excused" from the active-supervision requirement because its government is publicly elected and therefore "lack[s] the kind of private incentives characteristic of active participants in the market." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112-13 (citing *Hallie*, 471 U.S. at 45 n.9). No such presumption of public-mindedness is available to SRP. SRP "does not function to serve the whole people"; it is controlled by private landowners and "operates for the benefit of these" landowners. *Local 266*, 275 P.2d at 403. While SRP's board is elected by these private landowners (generally in proportion to their land holdings), that no more insulates it from the active-supervision requirement than does a dentistry board's "elect[ion] by other licensed dentists." *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1108. Given the "risk" these private landowners "will pursue private interests in restraining trade," SRP must demonstrate that its anticompetitive conduct is actively supervised by the State. *Id.* at 1114.

At the very least, whether SRP must satisfy this active-supervision requirement is itself a factual

question that turns on the extent to which it is controlled by private interests and acts to serve those interests. And whether SRP meets the active-supervision requirement likewise presents factual questions as to whether the State has "in fact" adequately supervised SRP's anticompetitive conduct. *Ticor Title*, 504 U.S. at 638. As SRP acknowledges, while some active-supervision decisions could conceivably turn on legal grounds, many others are based "on factual grounds." Br. 22-23. The district court's decision here falls in the latter category, as the court itself stated. Pet. App. 67a. As a result, even assuming some hypothetical set of "purely legal" *Parker* denials are appealable collateral orders (Br. 16), the order on appeal here was not a "purely legal" denial, and that alone is a basis to affirm the Ninth Circuit's decision dismissing SRP's appeal.

Second, SRP's proposed category of "legal" *Parker* denials is unworkable. In delineating the "categories of orders" to which the three-factor collateral-order test applies, this Court uses a functional approach that looks to "the competing considerations underlying all questions of finality," including "the inconvenience and costs of piecemeal appeal and the danger of denying justice by delay." *Johnson*, 515 U.S. at 315. Only in the qualified-immunity context has this Court drawn the sort of factual/legal distinction that SRP proposes. *Id.* at 317. It has refused to draw that line in other circumstances where it sees no "basis" for doing so. *Ibid.*; *see Puerto Rico Aqueduct*, 506 U.S. at 147 (declining to distinguish between sovereign-immunity

claims "bound up with factual complexities" and those that are not). Here, SRP provides no particular basis for dividing "legal" *Parker* decisions from "factual" ones—and there are strong reasons not to do so.

To start, SRP's proposed categorization would lead to the very piecemeal appeals and inefficiency that Section 1291's finality requirement is intended to eliminate. *Will*, 546 U.S. at 349-50. Even where the denial of a *Parker* defense is on solely legal grounds, the reversal of such a legal conclusion will not always resolve the *Parker* issue. SRP is mistaken in contending otherwise. *See* Br. 23-24. Take an order holding that a cited state statute provides no clear articulation for a defendant's conduct. Even if this legal conclusion were reversed in a prejudgment appeal, that would not necessarily mean the defendant's conduct is exempt from the antitrust laws. On remand, the district court often would still need to decide whether the defendant is subject to the active-supervision requirement and, if so, whether that requirement is satisfied. *North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1112-14. While the appellate court's interlocutory intervention would have resolved one nondispositive (yet "legal") prong of *Parker*'s multifactor inquiry, it would have done little to advance the ultimate resolution of the dispute. All that such an interlocutory appeal would guarantee is significant delay. *See Coopers & Lybrand*, 437 U.S. at 474 (where district court could deny class certification on new grounds even after earlier denial was reversed in interlocutory appeal, "the potential for multiple appeals in every complex case is apparent and serious").

SRP's proposed subcategory would also create difficult jurisdictional questions for the courts of appeals. As the present case demonstrates, parties may often dispute whether a district court's denial of a *Parker* defense rests on legal or factual grounds. Courts of appeals therefore would be forced to make complex threshold determinations in nearly every case just to determine whether they have jurisdiction. For example, courts would have to draw fine lines between (1) decisions that rely on a state statute to hold that a state subdivision is not democratically accountable as a matter of law and (2) those that hold only that the statute does not defeat all possible inferences of private party control. *See North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1114. Courts of appeals also would have to determine how to characterize decisions that appear to involve a mix of such inquiries. *See Ticor Title*, 504 U.S. at 638. In addition, parties might attempt to argue that a denial relying on the need for factual development can be characterized as reflecting legal error—contending, for example, that the district court erred in citing factual issues regarding the State's supervision because that requirement is inapplicable as a matter of law. *Cf.* Cert. Reply at 7-8. Refereeing such disputes would effectively require courts of appeals to decide part of the merits of the *Parker* defense to determine whether they have appellate jurisdiction to decide it. That would be a "strange scheme." *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998) (so denigrating a holding that would convert any merits question into a jurisdictional one).

This Court has explained that "administrative simplicity is a major virtue in a jurisdictional statute" and that "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Especially in light of this principle, any "incremental benefit" SRP's carve out for "legal" *Parker* denials might conceivably provide would be "outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice." *Coopers & Lybrand*, 437 U.S. at 473; *see Cunningham*, 527 U.S. at 209 (refusing to define class of orders in manner that "could not be easily administered"); *Mohawk*, 558 U.S. at 113 (citing "line-drawing difficulties" as reason not to extend collateral-order doctrine).

In all these respects, *Parker* denials diverge from the orders denying qualified immunity to which SRP attempts to analogize. *See* Br. 24-25. Unlike the multi-factor, mixed-law-and-fact *Parker* inquiry, qualified immunity generally turns on a single legal question: whether the defendant's conduct (either alleged or admitted) violates clearly established law. *Johnson*, 515 U.S. at 313. For that reason, the successful interlocutory appeal of such an order will definitively dispose of the issue. If the defendant's supposed conduct does not violate clearly established law, the defendant is entitled to qualified immunity. Such appeals therefore may promote rather than impair judicial efficiency.

Additionally, orders resolving purely legal qualified-immunity questions may be meaningfully distinguished from those holding only that material disputes of fact exist as to whether the defendant committed the alleged conduct—the fact-based orders this Court has held may not be immediately appealed. *Plumhoff*, 134 S. Ct. at 2019. Even this distinction has been the subject of some uncertainty. *Ashcroft*, 556 U.S. at 674. Yet it is far more tenable—and far less likely to produce repeated, unnecessary litigation—than is SRP's distinction between legal and factual *Parker* denials. SRP's proposed line will require courts of appeals not simply to evaluate whether the parties' dispute concerns the defendant's commission of the conduct alleged, *Plumhoff*, 134 S. Ct. at 2019, but whether the district court's particular application of the various factors relevant to the *Parker* inquiry are more aptly characterized as factual or legal. *Supra* p. 50.

Third and finally, even strictly "legal" *Parker* issues are not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. Again, as explained above (*supra* pp. 39-41), any *Parker* decision—whether legal or factual—is part of the merits: whether the state-action doctrine applies determines the lawfulness of the defendant's conduct. SRP's gerrymandered subcategory does not enable it to escape this essential aspect of the *Parker* doctrine.

Determining whether a state statute clearly articulates a policy permitting the challenged restraint—SRP's quintessential "legal ground" for a *Parker* appeal (Br. 19-20)—will require courts to consider whether

this sort of conduct might have been "foreseeable" (circumstances likely to also bear on whether the conduct is anticompetitive). *Supra* pp. 43-44; *Phoebe Putney*, 568 U.S. at 229. Whether the apparent absence of any statute providing for specific supervision is significant (Br. 22-23) also may overlap with the legal inquiry into the anticompetitive dangers posed by the defendant's supposed conduct. *Supra* pp. 44-45; *Ticor Title*, 504 U.S. at 640. While some minimal overlap between a collateral order and the underlying merits does not necessarily defeat appealability (Br. 21 (citing *Osborn*, 549 U.S. at 238)), this sort of involved "scrutin[y] [into] the substance of the dispute between the parties" does. *Van Cauwenberghe*, 486 U.S. at 528.

III. INTERLOCUTORY ORDERS DENYING A *PARKER* STATE-ACTION DEFENSE ARE NOT CONCLUSIVE

SRP also cannot satisfy the remaining collateral-order requirement: conclusiveness. An order or decision is conclusive only if it is "made with the expectation that [it] will be the final word on the subject addressed." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988). Neither the general category of orders denying a *Parker* defense nor the particular order SRP attempts to appeal meets that standard.

A. The General Class Of Orders Denying *Parker* Defenses Is Not Conclusive

1. *Parker*'s applicability in a given case is a question that often cannot be definitively resolved on

the pleadings or at summary judgment. As explained, the applicability of a state-action defense depends on a number of different facts and circumstances. *Supra* pp. 43-45; *see North Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1114-16; *Phoebe Putney*, 568 U.S. at 229. Particularly because *Parker* is an affirmative defense, *Hallie*, 471 U.S. at 39, the relevant facts and circumstances considered may well change over the course of litigation as the defendant presents supporting evidence. As the case evolves from the pleading stage to summary judgment to trial, a district court "ordinarily would expect to reassess and revise" its determination whether *Parker* shields a defendant from liability. *Gulfstream Aerospace Corp.*, 485 U.S. at 277. This sort of "inherently tentative" order is not conclusive. *Ibid.*

A recent series of decisions from the Second Circuit illustrates the extent to which the *Parker* analysis may change as the litigation moves beyond the pleading stage. In *Freedom Holdings, Inc. v. Spitzer*, the court of appeals considered the sufficiency of a complaint alleging that a state policy effectively allowed tobacco manufacturers to enter into a market-sharing agreement in violation of the antitrust laws. 357 F.3d 205, 208 (2d Cir. 2004). Reversing the district court's initial dismissal, the Second Circuit held that the defendants had not satisfied *Parker* because it was not yet clear whether the challenged program was sufficiently related to the State's public health goals or whether there was any means for active state supervision over tobacco manufacturers. *Id.* at 230-32.

Following a bench trial, however, the district court found *Parker* applicable, concluding that the defendants' "proofs" demonstrated both that the program had "brought about a substantial reduction in cigarette consumption and substantial reimbursements" to the State, and that the State had "closely tracked the actual workings" of the program through an auditing mechanism. *Freedom Holdings, Inc. v. Cuomo*, 592 F. Supp. 2d 684, 701-02 (S.D.N.Y. 2009). On appeal, the Second Circuit affirmed, noting in particular that "[t]he active supervision required to secure state action immunity necessarily depends on the facts of each case." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 61 (2d Cir. 2010). Such potential for revisiting earlier rulings is inherent in the fact-intensive *Parker* analysis, making it a poor candidate for interlocutory appeal.

2. SRP hopes to avoid this conclusiveness problem in two ways. First, SRP again seeks to narrow the relevant category of *Parker* denials to those raising "purely legal" issues. Br. 16. But as explained, this effort fails both because SRP's own appeal does not raise such "purely legal" issues and because such a narrowed category is unworkable. *Supra* pp. 45-52.

Second, SRP asserts that, like qualified immunity, the denial of a *Parker* defense "'finally and conclusively determines the defendant's claim of *right not to stand trial* on the plaintiff's allegations.'" Br. 16 (quoting *Mitchell*, 472 U.S. at 527) (emphasis added); *see also Martin*, 86 F.3d at 1396 (finding the conclusiveness requirement satisfied on this basis);

Commuter Transp. Sys., 801 F.2d at 1286 (same). Yet *Parker* provides an exemption from Sherman Act liability, not any "right not to stand trial." *Supra* pp. 20-24. An order denying a *Parker* defense thus does not definitively determine the defendant's right to be exempt from trial, because the defendant has no such right. Instead, it provisionally determines that the federal antitrust laws prohibit the alleged anti-competitive conduct. Because this issue may "'remain[ ] open, unfinished and inconclusive' until the trial court has pronounced judgment," it cannot be immediately appealed. *United States v. MacDonald*, 435 U.S. 850, 859 (1978) (quoting *Cohen*, 337 U.S. at 546; alteration omitted).

B. The District Court's Order Here Did Not Conclusively Resolve The *Parker* Issue

Even if district court denials of a *Parker* defense could generally be deemed conclusive, the particular order here cannot be. In the order, the district court did not definitively conclude that the *Parker* defense was unavailable to SRP. Instead, it determined there were "factual" questions that could not be "resolved" on a motion to dismiss. Pet. App. 67a. And in later denying SRP's Section 1292(b) motion, the court expressly stated that it "did not make a final decision on the state-action doctrine." Pet. App. 33a n.7. The tentativeness of the district court's decision is alone reason to affirm the Ninth Circuit's dismissal of SRP's appeal.

The circumstances here parallel those this Court confronted in *Swint*. There, in denying the county defendant's summary judgment motion, the district court observed that a key state official "*may have been* the final decision-maker for the" county (a potentially dispositive question). *Swint*, 514 U.S. at 42. The district court also advised the parties that they would "have an opportunity to convince th[e] Court that [this official] was or was not the final policy maker." *Id.* at 39. Because the district court's summary judgment decision was "tentative, informal or incomplete," *Swint* held it was not an appealable collateral order. *Id.* at 42; *see Cohen*, 337 U.S. at 546 ("The effect of [Section 1291] is to disallow appeal from any decision which is tentative, informal, or incomplete.").

Thus, even where a district court's order deals with an issue that may generally fall within the collateral-order exception (an analysis conducted by looking at "the class of claims, taken as a whole," *Mohawk*, 558 U.S. at 107), appellate jurisdiction exists only where the particular order also definitively resolves that issue. *See Swint*, 514 U.S. at 42; *cf. Digital Equip.*, 511 U.S. at 869 n.2 (looking at specific language of underlying order in discussing conclusiveness). After all, while this Court has given Section 1291 a "practical construction," *id.* at 867, it would be difficult to construe the statutory requirement of a "final decision" as satisfied by a decision that the district court expressly states is *not* final. Accordingly, where, as here, the district court "has expressly

held open the prospect of reconsideration, appeal is denied." 15A Wright & Miller § 3911.1.

SRP contends that *Swint* is distinguishable because the *Swint* district court was awaiting further "factual development," while here the "district court's clear-articulation ruling * * * resolved a purely legal question." Br. 18. But SRP again disregards the order from which it appealed, which concluded that the active-supervision requirement presented factual questions that remained unresolved. Pet. App. 67a; *see supra* pp. 8-10, 46-48.

Regardless, even if the district court's order had turned solely on a legal issue, it was one the court specifically stated was *not* conclusively resolved. SRP relies (Br. 10) on the district court's subsequent denial of Section 1292(b) certification, while asking this Court to ignore the district court's statement in that same order that its *Parker* decision was not "final" and that SRP was "free to raise" the issue "at summary judgment" (as SRP in fact did in its still-pending motion). Pet. App. 33a n.7. But such statements are not a matter of mere "fortuity" (*cf.* Br. 17); rather, they manifest the district court's own view that its decision was "tentative." *Swint*, 514 U.S. at 42. The district court should be taken at its word: because its rejection of SRP's *Parker* defense was not a "final decision" (Pet. App. 33a n.7), Section 1291 provides no basis for appellate jurisdiction. Any other outcome would represent the sort of "encroach[ment] upon the prerogatives of district court judges" that Section 1291 seeks to avoid. *Mohawk*, 558 U.S. at 106.

IV. THE COLLATERAL-ORDER DOCTRINE SHOULD NOT BE EXPANDED

Although SRP's request to expand the collateral-order doctrine fails under the well-established tenets of the doctrine itself, the availability of other means for seeking appellate review further counsels against expansion.

Litigants in SRP's position have alternative avenues for pursuing interlocutory appeals—avenues tailored to specific circumstances where immediate intervention is warranted. In particular, antitrust defendants can (as SRP did here) "ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Mohawk*, 558 U.S. at 110. This path provides a particularly good fit for SRP's proposed subcategory of "legal" *Parker* decisions, as Section 1292(b) authorizes appeal where there is a "controlling question of law" that the court of appeals might resolve differently. 28 U.S.C. § 1292(b). It also allows the courts to assess whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Ibid.* Where, for example, a court of appeals' reversal would still leave additional *Parker* issues for the district court to resolve, allowing the litigation to proceed in the district court will often be more efficient. *Supra* p. 49. And putting Section 1292(b) aside, a defendant asserting a *Parker* defense may, in extraordinary circumstances, "petition the court of appeals for a writ of mandamus." *Mohawk*, 558 U.S. at 111.

Additionally, this Court may use the rulemaking process to render certain classes of orders subject to immediate appeal. 28 U.S.C. §§ 1292(e), 2072. Congress provided this Court with such authority in 1990 and 1992 amendments to the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.* This Court has recognized that Congress thus "designat[ed] rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113. The Court has emphasized that the existence of this congressionally approved rulemaking process provides all the more reason to ensure that the "class of collaterally appealable orders * * * remain narrow and selective in its membership." *Ibid*; *see id.* at 115 (Thomas, J., concurring in part and concurring in the judgment) (opining that given the statute, only orders "on all fours with orders we previously have held to be appealable under the collateral order doctrine" should be recognized).

This rulemaking process has distinct advantages. It "draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114 (citation omitted). For example, after this Court in *Mohawk* declined to extend the collateral-order doctrine to disclosure orders adverse to the attorney-client privilege, the Advisory Committee on Appellate Rules considered "a range of options" as "possible rulemaking responses." Minutes of Spring 2010 Mtg. of Advisory Cmte. on

Appellate Rules 12 (Apr. 8 and 9, 2010).[4] Ultimately, the Committee determined that any such amendment was unwarranted because, among other things, it would be difficult to cabin the class of appealable privilege orders and could unduly burden the courts of appeals. Minutes of Fall 2014 Mtg. of Advisory Cmte. on Appellate Rules 7-8 (Oct. 20, 2014);[5] *see also Microsoft*, 137 S. Ct. at 1714 (discussing the years-long consideration and "informed assessment" that led the Advisory Committee to propose what is now Federal Rule of Civil Procedure 23(f)). If immediate appeals of SRP's proposed class of "legal" public-entity *Parker* denials are to be authorized, it should come from this sort of measured, deliberative process, not through the extension (and distortion) of the collateral-order doctrine. *Mohawk*, 558 U.S. at 114.

---

[4] *Available at* http://www.uscourts.gov/sites/default/files/fr_import/AP04-2010-min.pdf.

[5] *Available at* http://www.uscourts.gov/sites/default/files/appellate-minutes-10-2014_0.pdf.

CONCLUSION

The judgment dismissing the appeal should be affirmed.

Respectfully submitted,

RICHARD A. FEINSTEIN
BOIES, SCHILLER & FLEXNER LLP
1401 New York Ave., N.W.
Washington, D.C. 20005

STEVEN C. HOLTZMAN
KATHLEEN R. HARTNETT
SEAN P. RODRIGUEZ
BOIES, SCHILLER & FLEXNER LLP
1999 Harrison St.
Oakland, CA 94612

DEANNE E. MAYNARD
Counsel of Record
JOSEPH R. PALMORE
JEFFREY A. JAECKEL
SOPHIA M. BRILL
SETH W. LLOYD
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8740
DMaynard@mofo.com

JAMES R. SIGEL
MORRISON & FOERSTER LLP
425 Market St.
San Francisco, CA 94105

Counsel for Respondent Tesla Energy Operations, Inc.

FEBRUARY 12, 2018